

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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In the Matter of the Application of  
ILATANET, LLC for Authorization  
to obtain a Certificate of Public  
Convenience and Necessity as a  
Telephone Corporation Pursuant to  
the Provisions of Public Utilities  
Code Section 1001.

Application 14-01-029  
(Filed January 31, 2014)

**OPENING BRIEF  
OF THE CONSUMER PROTECTION AND ENFORCEMENT DIVISION**

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June 17, 2016

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**I. INTRODUCTION**

Pursuant to the Assigned Commissioner’s Scoping Memo and Ruling (Scoping Memo) issued on May 9, 2016, the Consumer Protection and Enforcement Division<sup>1</sup> (CPED) submits this Opening Brief, in the matter of Application (A.) 14-01-029 (Application). In 2014, Ilatanet, LLC (“Ilatanet” or “Applicant”) filed this Application seeking a Certificate of Public Necessity and Convenience (CPCN) as a telephone corporation pursuant to Public Utilities Code (PU Code) section 1001.<sup>2</sup> Subsequently, Ilatanet filed a Motion to Dismiss this Application on the grounds that Ilatanet does not provide any services subject to the Commission’s jurisdiction and no longer seeks authority to do so.<sup>3</sup>

CPED’s Protest of the Application questions the fitness of Ilatanet, and its principal owner, Chief Executive Officer (CEO) and President Douglas S. Devine, to

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<sup>1</sup> As of June 1, 2016, SED’s Utility Enforcement Branch (UEB) has been combined with other branches to form the Commission’s new Consumer Protection and Enforcement Division (CPED). Herein, this document refers to CPED as SED’s successor division.

<sup>2</sup> All section references are to the Public Utilities Code unless otherwise specified.

<sup>3</sup> Ilatanet Motion to Dismiss Application, September 26, 2014.

operate as a telephone corporation or as a provider of prepaid calling card services, because Ilatanet has been operating without authority, and in its Application it failed to disclose past administrative sanctions against Mr. Devine.<sup>4</sup>

Despite the fact that Ilatanet's Application sought authority to offer prepaid calling card services, Ilatanet now claims that it does not provide prepaid calling card services, and therefore does not require Commission authority to operate in California. However, the facts developed in this proceeding prove that the service offered by Ilatanet is in fact a prepaid calling card service, and Ilatanet is prohibited from operating without authority pursuant to PU Code sections 885 and 886. Ilatanet must be licensed to operate in California.

In addition, CPED recommends that Ilatanet be fined for Commission Rules of Practice and Procedure Rule 1.1 violations, for misrepresenting Mr. Devine's history of regulatory violations on its Application, and also for repeatedly mischaracterizing the service that Ilatanet offers in order to avoid responsibility to comply with applicable laws. Finally, the Scoping Memo raises the issue of Mr. Devine's failure to comply with a San Francisco Superior Court order that adopted a settlement between Consumer Protection and Safety Division (CPSD) and the California Attorney General<sup>5</sup> and Mr. Devine,<sup>6</sup> as well as a Commission decision adopting that Superior Court stipulated judgment and settlement.<sup>7</sup> In that settlement, Mr. Devine committed to seek authority prior to operating in the future, and to identify the prior regulatory action and settlement in future applications at the Commission, both of which he failed to do.

## **II. BACKGROUND**

The facts of this case are taken from Ilatanet's Application, SED's investigation and Protest, Ilatanet's Motion to Dismiss, SED's Response to the Motion to Dismiss and

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<sup>4</sup> SED's Protest of the Application, March 13, 2014.

<sup>5</sup> SED was formerly referred to as CPSD.

<sup>6</sup> Assigned Commissioner's Scoping Memo and Ruling, May 9, 2016.

<sup>7</sup> D.07-11-003.

accompanying Staff Declaration of Brian Hom, prior court decisions involving Mr. Devine, a past Commission decision, and the Administrative Law Judge (ALJ) Ruling Denying the Motion to Dismiss.

In 2006, Devine Communications, Inc. submitted Application (A.) 06-11-001 for authority to provide “interLATA and intraLATA telecommunications service in California as a switchless reseller.”<sup>8</sup> In October 2006, the Commission authorized staff to cooperate with the California Attorney General’s Office (AG) in investigating Devine as part of a larger effort to step up enforcement of rules pertaining to prepaid phonecards, or “telephone prepaid debit cards.”<sup>9</sup> CPSD had concerns that Devine was selling prepaid phonecards without accurately disclosing all rates, fees, surcharges, terms, and conditions associated with use of the cards, as required by Business & Professions Code (B&P) Section 17538.9, and also operating without authority at that time.

In 2007, CPSD and the AG’s office filed a complaint in San Francisco Superior Court against Devine Communications and Douglas Serge Devine (the same Mr. Devine that owns and operates Ilatanet).<sup>10</sup> In the complaint, CPSD and the AG presented a Proposed Judgment containing a stipulation c containing the terms of an injunction and a Settlement Agreement with Devine Communications.<sup>11</sup> The Proposed Judgment prohibited Devine from “advertising, issuing, distributing, marketing, selling, or otherwise offering Prepaid Calling Cards or any other telecommunications service in California without first obtaining a valid certificate of public convenience and necessity from the Commission.”<sup>12</sup> In addition, Devine was ordered to pay \$118,000 in civil penalties divided evenly between the AG and the CPUC, and ordered not to advertise,

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<sup>8</sup> See D.07-11-003 at 1.

<sup>9</sup> D.07-11-003 at 2.

<sup>10</sup> Ibid. The complaint was styled as *People v. Devine Communications Inc., MegaLink, and Douglas Serge Devine*, S.F. Superior CGC07-462325.

<sup>11</sup> Final Judgment and Permanent Injunction, in *People v. Devine, supra* (April 13, 2007) and the All Party Settlement Agreement, copies are attached hereto.

<sup>12</sup> Ibid.

issue, distribute, market, sell, or otherwise offer prepaid calling cards in California until these penalties are paid in full.<sup>13</sup> Finally, the Settlement Agreement contained a provision wherein Devine committed to identify the Settlement Agreement in any future applications to the Commission for authority to operate.<sup>14</sup>

Ilatanet is a Nevada Limited Liability Corporation and its principal place of business is located at 1750 N Buffalo Drive, Las Vegas, NV 89128. Ilatanet's CEO and President is Douglas Serge Devine.<sup>15</sup> Ilatanet's initial Application sought authority to "provide service via prepaid debit/calling cards." The Application acknowledged that Ilatanet has been providing prepaid calling card services in the State of California without proper Commission authority.<sup>16</sup>

The Application states that Ilatanet is an International 214 registered carrier that was formed in 2011 to provide a long distance service called Tawag Na Direct to American Filipinos.<sup>17</sup> CPED conducted an Internet search for Ilatanet's Tawag Na Direct service and located the following website, <http://www.mytawagnadirect.com>, offering "long distance services to the Filipino-American community for over 12 years."<sup>18</sup> This contradicts the Application's claim that Ilatanet has been only operating since 2011. The mailing address located at the Tawag Na Direct Contact Us webpage<sup>19</sup> matches the address provided in the Application for Ilatanet. Tawag Na Direct's customer service is supported by Devine Care Inc., another company listed on Mr. Devine's resume.<sup>20</sup> The Terms & Conditions webpage offers no further clarification regarding the Ilatanet/Tawag

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Attachment B to Ilatanet's Application 14-01-029.

<sup>16</sup> Application 14-01-029 at 2. The Application does not state for how long Ilatanet has been providing calling card services.

<sup>17</sup> Application 14-01-029 Exhibit 5 Biographical Information Douglas Devine Resume

<sup>18</sup> Protest at 3.

<sup>19</sup> <http://www.mytawagnadirect.com/contact.cfm>.

<sup>20</sup> Application 14-01-029 Exhibit 5 Biographical Information Douglas Devine Resume.

Na Direct relationship, stating instead, “The MyTawagnadirect.com Web Site (the “Web Site”) is an online service powered under the Managed Prepaid hosting platform and telecommunications services are provided by Devine Communications, Inc. (DCI)<sup>21</sup>, with no mention of Ilatanet.

The background of Ilatanet as described in its Application is not clear. CPED located a Form 499 from the Federal Communications Commission (FCC) for Ilatanet, LLC.<sup>22</sup> The headquarters address for this company is P.O. Box 171, Vallejo, CA 94590, different from what was on the Application. Under the section “Other Trade Names” the form lists “Tawag Na Direct, Devine Communications and Devine Care Inc.”<sup>23</sup>

The initial Application makes no mention of Ilatanet’s link to either DCI or Devine Care.<sup>24</sup> The initial Application does state that Mr. Devine is the President and CEO.<sup>25</sup> CPED located a Form 499 from the FCC for DCI and under the Other Trade Names the form lists “Tawag Na Direct.” Devine’s Form 499 also has the same Customer Inquiries Telephone number as Ilatanet’s Form 499 and the Tawag Na Direct’s website. Ilatanet appears to be a new company attached to an already existing service called Tawag Na Direct that, per its own website, is managed by DCI, and has been doing business for over 12 years, not since 2011 as stated in the Application.

The Commission’s Communications Division, on May 31, 2013 and August 22, 2013, directed Ilatanet to file for the requisite authority to operate in the State of California.<sup>26</sup> However, Ilatanet made no attempt to contact the Commission or file for the requisite authority until receiving a Cease and Desist notice on January 21, 2014 from

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<sup>21</sup> <http://www.mytawagnadirect.com/terms.cfm>.

<sup>22</sup> Protest at 4.

<sup>23</sup> <http://apps.fcc.gov/cgb/form499/499detail.cfm?FilerNum=828865>.

<sup>24</sup> Protest at 4.

<sup>25</sup> Initial Ilatanet Application at 7, and Attachment B.

<sup>26</sup> Protest at 4.

CPED, warning of possible legal action.<sup>27</sup> Ilatanet filed its Application on January 31, 2014.

On March 14, 2014, CPED filed a protest of the Application. On April 1, 2014, Ilatanet filed a response, which states “Applicant does not dispute that is has provided debit/prepaid phone card service in California without authority, in violation of Public Utilities Code Sections 885-886.”<sup>28</sup> Ilatanet further stated that “Applicant will respond fully to all CPED Data Requests to ensure a transparent and complete investigation.” The stated purpose of the admissions and commitments was to “resolve all issues of non-compliance...so that the CPED Protest can be resolved and the Application is cleared for approval.”

On July 23, 2014, the assigned ALJ issued a ruling setting a prehearing conference (PHC) for August 27, 2014, and directing the Applicant to personally appear and to provide clarification regarding the Applicant’s failure to report the above-noted administrative sanctions, the status of repayment of any outstanding fine or penalty, and all information required by the Application as well as any outstanding data requests issued by CPED.<sup>29</sup>

On August 15, 2014, Ilatanet filed an amended Application in response to the ALJ ruling. Contrary to its initial Application and its April 1, 2014 filing, Ilatanet now contends it does not sell “telephone pre-paid debit cards.” During a PHC on August 27, 2014, Ilatanet’s president, Mr. Douglas Devine, identified the company as a “PINless, long-distance program, someone uses in the United States to call the Philippines.”<sup>30</sup>

On September 26, 2014, Ilatanet next filed a Motion to Dismiss the Application “because Applicant provides no services subject to the Commission’s jurisdiction nor seeks authority to do so,” and the Application is “more appropriately terminated on

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<sup>27</sup> Ibid.

<sup>28</sup> Ilatanet Response to SED Protest at 1.

<sup>29</sup> ALJ Ruling Denying Motion to Dismiss, April 18, 2016, at 2.

<sup>30</sup> Prehearing Conference Transcript, August 27, 2014, p. 7:12-14.

jurisdictional grounds.”<sup>31</sup> On April 18, 2016, the ALJ denied Ilatanet’s Motion to Dismiss, finding that the services provided by the Applicant appear to be, in effect, calling card services as defined in B&P Code Section 17538.9.<sup>32</sup> The Ruling noted that Section 886 prohibits entities from offering the services of telephone prepaid debit cards without authority, and any provider that offers such services without authority may be subject to fines and penalties by the Commission.

### **III. DISCUSSION**

The discussion herein follows the issues set forth in the May 9, 2016 Scoping Memo.

**1. Is Ilatanet’s principal, Douglas Devine, in full compliance with the terms and conditions of the settlement agreement adopted in D.07-11-003?**

No. The Settlement Agreement adopted in D.07-11-003 does three things: 1) it memorializes that Devine has stipulated to a judgment in the civil action; 2) it memorializes Devine’s agreement that failure to pay civil penalties required by the judgment may subject it to revocation of its license to operate; and 3) it memorializes Devine’s agreement to identify this Settlement and concomitant Stipulated Judgment in any future Commission Application. A copy of the Settlement Agreement is attached as Appendix A to D.07-11-003.

CPED staff has verified that Devine paid the \$118,000 fine imposed by the stipulated judgment.

However, as described above, the stipulated judgment provides that Devine is enjoined from offering prepaid calling cards without first obtaining authority from the Commission.<sup>33</sup> Mr. Devine is the CEO and President of Ilatanet, who admitted in its Application to offering prepaid calling cards without Commission authority. Ilatanet’s

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<sup>31</sup> Ilatanet Motion to Dismiss at 1.

<sup>32</sup> ALJ Ruling Denying Motion to Dismiss at 7.

<sup>33</sup> See attached Final Judgment and Permanent Injunction at 3.



Application states: “Applicant acknowledges that it has been providing prepaid calling card services in the state of California without proper Commission authorization.” This is a clear violation of the stipulated judgment, in which both Devine Communications (with Mr. Devine as the owner and operator) and Mr. Devine himself as an individual were the named defendants and committed to obtain authority prior to operating in California.

Moreover, the Final Judgment and Permanent Injunction permanently enjoins and restrains the Defendants (Devine Communications, Megalink, and Mr. Devine as an individual) from violating Sections 885, 886, and 1013 by offering “prepaid calling cards or any other telecommunications service” (emphasis added) in California without first obtaining authority.<sup>34</sup> In this respect, the issue of whether Ilatanet offers a calling card service as it stated in the initial Application, or some other kind of “resold interexchange service statewide” that is not fully explained in its amended Application, is not relevant. In either case, Ilatanet must be licensed under state law. If Ilatanet offers prepaid calling card services, it must be licensed under Section 885. If it resells interexchange service, it must be licensed under Section 1001.<sup>35</sup>

In *Investigation of Clear World*, D.05-06-033, the Commission held that resellers of long distance telephone service are utilities that must register with, and obtain a CPCN from, the Commission pursuant to Sections 1001 and 1013(a). In the *Clear World* case, the Commission noted that licensed telephone companies frequently employ agents or independent contractors to sell their telephone products.<sup>36</sup> The Commission held that resellers of long distance service in California are not “agents” of other licensed resellers and cannot operate without obtaining their own operating authority.<sup>37</sup> Thus, as a reseller of “interexchange service,” Ilatanet must also have Commission authority to operate.

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<sup>34</sup> Ibid.

<sup>35</sup> D.05-06-033 at 10.

<sup>36</sup> D.05-06-033 at 8.

<sup>37</sup> D.05-06-033 at 2.

Secondly, Mr. Devine committed to identify the Settlement Agreement and past Commission action in any future applications here at the Commission. Ilatanet's Application identifies Mr. Devine as the CEO and President but fails to mention anything about the Settlement Agreement, D.07-11-003, or the SF Superior Court Final Judgment and Permanent Injunction. The stipulated "All-Party Settlement" adopted in D.07-11-003 states:

Douglas S. Devine agrees, in any future Application made to this Commission on his own behalf or on behalf of any corporation or other business entity in which he is an officer, director, or beneficial owner of 10% or more of the business entity, or functions in any of those capacities, to identify this Agreement and the concomitant Stipulated Judgment, and state in such Application whether or not all payments have been made pursuant to such Stipulated Judgment.

Again, this is a clear violation of the terms of the stipulated agreement. Therefore, Mr. Devine is not in compliance with the terms of the Settlement Agreement adopted in D.07-11-003.

**2. What is the precise scope and nature of the telecommunications services being offered by Ilatanet in California?**

Ilatanet offers prepaid calling card services. CPED is not persuaded by Ilatanet's amended Application that deletes all the previous references to calling card services, and instead describes its service as a generic "resold interexchange service."<sup>38</sup>

Prepaid calling card services are not defined in the PU Code, but B & P Code Section 17538.9 defines "prepaid calling services" or "services" as "any prepaid telecommunications service that allows consumers to originate calls through an access number and authorization code, whether manually or electronically dialed."<sup>39</sup> In its

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<sup>38</sup> SED Protest at 2.

<sup>39</sup> The terms "prepaid calling card services" and "prepaid debit card services" are typically used interchangeably.

Application, Ilatanet stated: “Applicant intends to provide service via prepaid debit/calling cards.”<sup>40</sup> Ilatanet’s response to the Protest states “Applicant does not dispute that it has provided debit/prepaid phone card service in California without authority, in violation of PU Code Sections 885-886.”<sup>41</sup>

On August 15, 2014, Ilatanet filed a response and an amended response pursuant to the ALJ’s ruling. In its response, Ilatanet reported that the only service it has provided since November 1, 2012, is its Tawag Na Direct (TND) service, which was marketed as an international service, but at the time permitted intrastate calling.<sup>42</sup> In contradiction of its Application and Response to the Protest, Ilatanet’s amended Application now contends it does not sell “telephone pre-paid debit cards” within the meaning of Section 885 of the Public Utilities Code.

On September 4, 2014, Ilatanet filed an amendment changing the description of its services from a prepaid debit/calling card service to long distance telephone service, requesting authority to provide resold interexchange services statewide. Ilatanet’s reason stated in the amendment was “the Application mistakenly stated that Applicant provided prepaid long distance telephone service through the use of calling cards and, accordingly, sought authority to do so on an intrastate basis in California.”<sup>43</sup> The amended Application deletes all references to calling cards, but does not add an explanation about the nature of the services Ilatanet provides. Ilatanet’s amended Application provides no explanation as to why its service is not a prepaid calling card, despite previously and repeatedly describing it as such. The amended Application contains almost no description of service.

During a PHC on August 27, 2014, Ilatanet’s president, Mr. Douglas Devine, identified the service as a “PINless, long-distance program, someone uses in the United

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<sup>40</sup> Protest at 3.

<sup>41</sup> Ilatanet Response to SED Protest at 1.

<sup>42</sup> ALJ Ruling Denying Motion to Dismiss at 2.

<sup>43</sup> SED Reply to Motion to Dismiss at 2, citing to Ilatanet’s Amended Application at 1.

States to call the Philippines.”<sup>44</sup> However, during testing conducted by CPED Staff, staff found information which contradicts the amended Application and Mr. Devine’s claims that Ilatanet provides a “PINless” service. CPED Staff Brian Hom’s Declaration submitted in support of CPED’s Reply to the Motion to Dismiss documents how Mr. Hom was able to reach a “My Tawag na Direct” associate, who provided him with a PIN, security code, and access number upon the activation of his account.<sup>45</sup>

CPED staff further investigated the precise nature of Ilatanet’s service by examining its website. Ilatanet’s Terms and Conditions<sup>46</sup> refer to Ilatanet’s online product as the “customer’s prepaid calling card (PIN),” and the Terms and Conditions make numerous references to the product purchased from the firm’s website as a prepaid calling card.<sup>47</sup> The website only sells accounts with a PIN for long distance calls; the website does not have any other products.<sup>48</sup>

In addition, the ALJ made specific additional findings with regards to Ilatanet’s service. The ALJ noted that the Applicant’s website, [www.mytawagnadirect.com/terms.cfm](http://www.mytawagnadirect.com/terms.cfm), as of March 14, 2016, revealed numerous references to both “PINS” and “calling cards,” including:

- “PINS purchased through this web site”;
- “[L]ost or stolen PINS, misused PINS, unauthorized or fraudulent use of PINS, or for PINS that have unused or expired minutes”;
- “All prepaid cards shall have an expiration date linked to the date of purchase, at which point it shall expire automatically. The expiration date is communicated to you along with your PIN Number and Access Number immediately following purchase”; and
- “Devine Care Inc. allows no more than four (4) PINs per customer account. Devine Care Inc. reserves right to refuse promotional free minutes on the

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<sup>44</sup> Prehearing Conference Transcript, August 27, 2014, p. 7:12-14.

<sup>45</sup> Declaration of Brian Hom, Attachment A to SED’s Reply to Motion to Dismiss.

<sup>46</sup> Obtained on October 3, 2014 from <http://www.mytawagnadirect.com/terms.cfm>. See Declaration of Brian Hom, Attachment A to SED’s Reply to Motion to Dismiss.

<sup>47</sup> Declaration of Brian Hom, Attachment A to SED’s Reply to Motion to Dismiss.

<sup>48</sup> Ibid.

4th PINs onwards. Any such requests from Customer to create additional PINs must be accompanied by a new phone number (ANI).”

Ultimately, CPED agrees with the ALJ Ruling and concludes that Ilatanet is offering a calling card service. Ilatanet offers a prepaid service that allows consumers to “originate calls through an access number and authorization code,” which means that under B&P Code Section 17538.9 its service is a calling card service that must be licensed under PU Code Sections 885-886.

**3. Is Ilatanet proposing to offer services for which operating authority from this Commission is required?**

Yes. As described above, Ilatanet is offering prepaid calling card services. PU Code Section 885 grants the Commission jurisdiction to regulate telephone prepaid debit cards, including entities that purchase time from underlying interexchange carriers and offer or administer the services of telephone prepaid debit cards. Such service providers are required to register with the Commission under Section 1013.

As discussed above, even if Ilatanet is found to be offering “resold interexchange services,” it must also be licensed.

There are two arguments made by Ilatanet in its Motion to Dismiss that need to be addressed. First, Ilatanet claims that the “vast majority of Applicant’s traffic is international; the balance is interstate.”<sup>49</sup> Therefore, Ilatanet argues, “States do not have jurisdiction over interstate calls” and this Application must be dismissed.

However, Ilatanet misunderstands the basis for the Commission’s jurisdiction. The Commission’s jurisdiction does not depend on whether the phone calls placed using its services are interstate or intrastate. The Commission’s jurisdiction comes from the fact that Ilatanet offers prepaid calling card services in California as defined by B&P Code Section 17538.9 and PU Code Section 885.

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<sup>49</sup> Motion to Dismiss at 3.

The objection to the Commission’s jurisdiction over interstate calls has already been raised and rejected by the Commission. In *Skynet Communications*, applicant Skynet filed an application for permission to operate as a calling card provider, but then attempted to withdraw its application on the grounds that Skynet offered exclusively international traffic, and not intrastate traffic.<sup>50</sup> The issue in that proceeding was whether there is an exception to the registration requirement simply because Skynet was a provider of international phonecards and its California intrastate traffic was *de minimis*. The Commission held that there is no such exception. The *Skynet* decision found that “these statutes are not limited to phonecard providers providing intrastate services, and there is no exclusion for the hypothetical (and unusual) case where a provider of international phonecards would block access to intrastate calling on cards used in California.”

In a recent decision, the facts were essentially identical to the facts of this case. NobelTel offered calling card services in California but claimed a *de minimus* amount of intrastate traffic.<sup>51</sup>

In D.16-04-018, the Commission stated:

NobelTel does not contest it is operating without Commission authority but argues that it provides a *de minimis* amount of service in California. NobelTel claims that its prepaid calling cards are marketed for international calls and while the same calling cards may be used to make local calls in California, around 99% of calls are international in nature.

Prepaid phone card providers are subject to the registration requirements of Pub. Util. Code § 1013. There is no exception to the registration requirement simply because NobelTel is a provider of international phone cards and its California intrastate traffic is *de minimus*.

The second argument advanced by Ilatanet is that it does not provide calling card services, but instead offers long distance service that cannot be used to make intrastate

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<sup>50</sup> D.09-01-017 at 2.

<sup>51</sup> D.16-04-018.

calls.<sup>52</sup> Ilatanet argues that the “Commission’s lack of jurisdiction over international calls is well established and well recognized within the Commission.” However, this argument is factually and legally flawed.

As discussed above, Ilatanet offers prepaid calling cards, not long distance service. CPED’s investigation, Ilatanet’s initial application, amended application, and Prehearing Conference statements provide enough information to establish that Ilatanet offers a calling card service.

However, even assuming for argument’s sake that Ilatanet provides only “international calling” service, the Commission has long held that telephone companies that offer long distance calling must be licensed to operate.<sup>53</sup>

Ilatanet argues that the Commission has no jurisdiction over international calls because the FCC has “exclusive jurisdiction,” which is simply wrong. Not a single case cited by Ilatanet stands for the proposition that states may not require companies that provide international calls to maintain a state license. For example, Ilatanet cites to *McClure Tel. Co. v. AT&T Communs. of Ohio, Inc.* (N.D. Ohio 2009) 650 F. Supp. 2d 699, 707, for the proposition that the FCC has “exclusive jurisdiction” over international calls. In that case, McClure Telephone Company originally filed a state law collection claim against defendant AT&T Communications of Ohio. The suit involved a claim for damages under a state tariff, and the court held that if such claims arise under federal law they must be pursued in federal court. However, the case did not have any facts that are applicable here. There was no issue regarding whether AT&T Ohio did or did not have to have a state license to operate.

Even if one assumes that Ilatanet only offers international calling services, the Commission’s jurisdiction arises in two ways. First, it derives from the fact that California consumers are using Ilatanet’s long distance service in California. The Commission has long held that “long distance resellers” that operate in California must

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<sup>52</sup> Motion to Dismiss at 5.

<sup>53</sup> See, e.g., D. 12-10-018; D. 05-06-033; 1.94-03-020.

be licensed.<sup>54</sup> Companies that own, control, operate, or manage any telephone line for compensation within California must be licensed pursuant to Sections 234 and 1001. Reselling long distance service in California is a form of controlling and operating telephone lines within California. Second, Ilatanet's amended Application reported that the only service it has provided since November 1, 2012, is its Tawag Na Direct service, which was marketed as an international service, but at the time did permit intrastate calling.<sup>55</sup> Ilatanet acknowledged that intrastate calls accounted for approximately one-half of one percent of overall Ilatanet customer traffic.<sup>56</sup> Ilatanet has cited to no exemption from the licensing requirement for providing merely a *de minimus* amount of intrastate calls. In fact, in both *Skynet* and *NobelTel* the Commission rejected that argument.

**4. Has Ilatanet been offering services for which operating authority from this Commission is or was required without obtaining such authority?**

Yes. Ilatanet's initial Application admits that it was offering calling card services prior to filing this Application for authority to do so. An attachment to the Application states that it has been doing so since at least 2011.<sup>57</sup> However, Ilatanet's website <http://www.mytawagnadirect.com>, states that Ilatanet has been offering "long distance services to the Filipino-American community for over 12 years."<sup>58</sup> This contradicts the Application's claim that Ilatanet has been only operating since 2011.

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<sup>54</sup> D. 12-10-018; D. 05-06-033; I.94-03-020.

<sup>55</sup> ALJ Ruling Denying Motion to Dismiss at 2.

<sup>56</sup> Ibid.

<sup>57</sup> Application 14-01-029 Exhibit 5 Biographical Information Douglas Devine Resume.

<sup>58</sup> SED Protest at 3.



**5. If Ilatanet has been offering regulated services without operating authority, should it be subject to fines and penalties under Sections 2107 and 2108?**

Yes. Section 886 provides that entities that fail to obtain the appropriate authority to offer calling card services “shall be subject to fines or other sanctions that may be ordered by the commission.” (Emphasis added.)

Sections 885 and 886 do not provide for a specific fine amount. Therefore, Sections 2107 and 2108 are applicable, which state that any violation of an “order, decision, decree, rule, direction, demand, or requirement of the commission” is punishable by a fine of \$500 to \$50,000, and that each day the violation continues is considered a separate and distinct offense.

In this case, fines should be considered for five distinct categories of offenses. First, Ilatanet has been providing calling card services in California without authority in violation of Sections 885-886, for approximately 14 years if Ilatanet’s website is accurate.<sup>59</sup> Alternatively, Ilatanet’s amended Application acknowledged operations since 2011. Thus, the Commission should consider penalties for each day of Ilatanet’s operations without authority.

Second, Ilatanet’s president Mr. Devine was personally enjoined from operating a calling card company without authority in the Settlement Agreement entered into here at the Commission and approved as part of a joint CPUC-AG superior court proceeding in 2006, which he has been violating as described above. This also shows that Mr. Devine knowingly and intentionally violated the licensing requirements.

Third, Mr. Devine personally committed to disclose prior settlements and judgments in all future applications here at the Commission, which he failed to do. The settlement agreement was adopted as part of D.07-11-003, and thus violating the agreement is also a violation of a Commission decision, punishable under Sections 2107-

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<sup>59</sup> As discussed above, Ilatanet’s website advertised that it has been providing calling card services for 12 years, as of 2014.

2108. It is fair to conclude that Mr. Devine does not wish for the Commission to be aware of his prior history, and therefore concealed it intentionally.

Fourth, CPED's Protest alleges that Ilatanet provided misleading and inaccurate statements in its Application that failed to disclose the existence of adverse regulatory actions, in violation of the Commission's application requirements.<sup>60</sup>

Fifth, after repeatedly characterizing its service as a calling card service for which it needs operating authority, Ilatanet now mischaracterizes its service as a generic "resold interexchange service." However, its website describes a calling card service, as discussed above, and attempts by CPED staff to sign up for the service also indicate that the service is a calling card service. Rule 1.1 prohibits parties from misleading the Commission through artifice or false statements, and it appears that Ilatanet's attempts to re-characterize its service are nothing more than an attempt to avoid the Commission's jurisdiction and any responsibility for violating the settlement agreement and permanent injunction.

The Commission would be justified in imposing a fine for each day Ilatanet operated without authority since 2002, or approximately 5,000 days, if Ilatanet's website is accurate. The Commission would also be justified imposing a separate fine for each day that Mr. Devine has operated in violation of the Settlement Agreement and Injunction. The Commission would further be justified in imposing fines for Ilatanet's attempts to mischaracterize its service in order to avoid jurisdiction and responsibility for compliance with the past agreement and injunction. Finally, failure to disclose prior settlements and negative actions against Mr. Devine in Ilatanet's Application is a separate and distinct offense because Mr. Devine personally committed to doing so, and also because the Commission's registration requirements specifically require that he do so.

In addition to fines, the Commission may also consider denying Ilatanet's Application and ordering Ilatanet to cease all operations, because Ilatanet has demonstrated a long history of flouting the Commission's rules and decisions as well as

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<sup>60</sup> SED Protest at 6.

the San Francisco Superior Court Permanent Injunction. As a result of these violations, Ilatanet has not demonstrated the necessary fitness to operate as a calling card service provider and a denial would be justified.

The Commission typically considers several factors in determining the size of the fine within the ranges prescribed by Sections 2107 and 2108.<sup>61</sup> The primary purpose of a fine is deterrence and avoiding violations.<sup>62</sup> The Commission also considers the economic harm to consumers as well as unlawful benefits gained by the utility; the size and scope of the violations; the utility's conduct in (1) preventing the violation, (2) detecting the violation, and (3) disclosing and rectifying the violation; the financial resources of the utility; the role of precedent; and the public interest.<sup>63</sup>

Considering the wide range of possible fines (\$500-\$50,000 per day), and taking into account the factors listed above, CPED recommends a fine large enough to have a deterrence effect. Several factors are important. First, the evidence shows that Mr. Devine committed the violations knowingly and intentionally, because by affixing his signature to the settlement agreement he personally committed to seek authority prior to operating in the future. Second, Ilatanet indicated in its initial Application and Mr. Devine stated at the PHC<sup>64</sup> that it has continued to sell its cards without authority, meaning that perhaps millions of dollars' worth of cards have been sold illegally. Third, Ilatanet's actions in rectifying the violation were slow and unreasonable, in that Ilatanet did not apply for authority until the Commission's Communication Division notified it to do so. Ilatanet has continued to operate and now disputes the Commission's authority despite clear Commission decisions to the contrary and its own clear statements that it knew it was operating without authority.<sup>65</sup> Fourth, Ilatanet's repeated compliance issues

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<sup>61</sup> See D.98-12-075.

<sup>62</sup> D.98-12-075; 1998 Cal. PUC LEXIS 1018, \*54.

<sup>63</sup> Ibid.

<sup>64</sup> PHC Transcript at 11:4-26.

<sup>65</sup> Application 14-01-029 at 2.

in California and other states indicate a history of problems, mismanagement, and knowing violations. Fifth, Mr. Devine has not shown that he has fully paid past fines, as discussed below. In conclusion, there are several aggravating factors that suggest a higher fine amount here, and no mitigating factors. A denial of this Application would also be justified.

**6. Have pleadings in this proceeding been filed with the intention to mislead the Commission, its staff and ALJs, in violation of Rule 1.1?**

Yes. Ilatanet's Application is misleading and inaccurate. The Commission's Rules of Practice and Procedure, Rule 1.1<sup>66</sup>, prohibit utilities from misleading the Commission or its staff "by an artifice or false statement of fact or law." Specifically, in response to Question 8 on the registration form, Applicant failed to disclose:

- The April 13, 2007 Final Judgment and Permanent Injunction against Mr. Devine and Devine Communications, Inc. by the Commission and State of California Department of Justice<sup>67</sup>;
- The March 29, 2012 Civil Judgment against Devine Communications, Inc. by the State of California Labor Commission<sup>68</sup>;
- The revocation of Devine Communications, Inc. operating authority for failure to pay fees and acquire a bond by the Commission;
- A 2011 fine issued by Florida Public Services Commission to Devine Communications, Inc. for its second-time violation of failing to remit regulatory assessments;<sup>69</sup>
- The 2012 revocation of Devine Communications, Inc. certificate of authority by the Hawaii Public Utilities Commission for failure to file its annual report and remit the public utility fee;<sup>70</sup>

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<sup>66</sup> It should be noted that the Scoping Memo slightly mischaracterizes Rule 1.1, by inserting the word "intention." That word does not appear in Rule 1.1, and the Commission has held that intent is not an element of Rule 1.1 – misleading the Commission by itself is a violation. See D.15-04-024 at 199: "knowingly," "purposely" or "intentionally" are not required by Rule 1.1.

<sup>67</sup> SED Protest at 6; San Francisco Superior Court Case NO. CGC07-462325.

<sup>68</sup> SED Protest at 6; California State Case Number 17-57828 DB.

<sup>69</sup> 2011 Fla. PUC Lexis 185.

<sup>70</sup> 2012 Haw. PUC Lexis 14.

- The citation issued in 2011 to Devine Communications, Inc. by the Illinois Commerce Commission for failure to file its annual report<sup>71</sup>;
- The revocation of Devine Communications, Inc. registration for failure to file an annual report and remit regulatory fees to Washington Utilities and Transportation Commission<sup>72</sup>;
- The estimated \$63,000 owed by Devine Communications, Inc. to the FCC (as required by Question 9 of the Application).

Ilatanet offers no good explanation as to why it omitted these important background facts, despite being specifically told to disclose them in a prior settlement and stipulating that it would do so. The prior adverse regulatory history bears directly on the Commission's determination regarding the Applicant's fitness to operate; thus it is fair to conclude that Ilatanet omitted them because it wanted its Application to be granted. Mr. Devine further stated at the PHC that he was unaware of any of these past adverse regulatory actions due to first living in San Francisco, then living overseas, and stated that he never received any notice of these issues.<sup>73</sup> When asked at the PHC if it was his responsibility to make sure he was informed about past regulatory issues throughout the country, Mr. Devine did not answer the question. Instead he blamed his office manager, stating: "I called my office manager Brenda, who is very efficient. We never received that, so I was really surprised."<sup>74</sup>

**7. Does Ilatanet have sufficient financial resources as required by Decision (D.) 95-12-056 (and recently restated in D.14-11-004)?**

There are sufficient grounds to find that Ilatanet failed to provide evidence of sufficient financial resources as required by D.95-12-056 and D.14-11-004. Those decisions require proof of financial responsibility for new applications for operating authority by interexchange carriers. Pursuant to D.95-12-056, applicants who have

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<sup>71</sup> 2011 Ill. PUC Lexis 62.

<sup>72</sup> 2011 Wash. UTC Lexis 973.

<sup>73</sup> PHC Transcript at 20:19-24.

<sup>74</sup> PHC Transcript at 21:2-9.

profitable interstate operations may meet the minimum financial requirement by submitting an audited balance sheet and income statement demonstrating sufficient cash flow.<sup>75</sup> New applicants are permitted to use any certain named financial instruments to satisfy the applicable unencumbered cash requirements established by D.95-12-056: cash or cash equivalent, certificate of deposit, line of credit or other loan, etc. As an applicant with existing operations, CPED recommends that the Commission require the proof typically required for existing companies, which is an audited balance sheet and income statement demonstrating sufficient cash flow. Ilatanet included only a Certificate of Deposit for \$25,000 with Citibank.<sup>76</sup> The Commission recently held that “A one-month bank statement is clearly insufficient to demonstrate the ongoing financial resources of the applicant, and does not comport with our intent as previously stated.”<sup>77</sup>

D.13-05-035 requires proof of a continuous performance bond in the amount of \$25,000, which is not included in Ilatanet’s Application. Instead, Ilatanet attached an Affidavit wherein it promises to obtain a performance bond, only after the Application is granted.

**8. Does Ilatanet have sufficient management expertise as required by D.95-12-056 (and clarified by D.13-05-035)?**

Ilatanet offered the resumes of its key management in Exhibit 5 of its Application. CPED’s concern is that Mr. Devine’s management expertise is relied on, when he has not personally demonstrated that he has sufficient knowledge of the applicable laws in California or demonstrated the ability to comply with those laws. When asked during the PHC if Ilatanet had an agent for service of process, Mr. Devine answered that he was unaware if Ilatanet had an agent for service of process.<sup>78</sup> Ilatanet also relies on the

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<sup>75</sup> D.14-11-004 at 3.

<sup>76</sup> Application at 4, footnote 2.

<sup>77</sup> D.14-11-004 at 5.

<sup>78</sup> PHC Transcript at 23:24-27.

telecommunications experience of Mr. Devine's sister, who has no such experience, but is listed as having a background in special education.<sup>79</sup>

**9. What is the status of Ilatanet's payment of fines and penalties imposed by this Commission, and other state and federal regulatory authorities?**

CPED has confirmed that Mr. Devine paid the \$118,000 fine pursuant to the prior settlement. Ilatanet's responses to the ALJ's requests for further information include exhibits which show the payment of the fines in other jurisdictions that are listed in CPED's Protest.

Ilatanet's response explains that \$112,531.57 of a \$281,326.43 debt to the FCC by Devine Communications was paid leaving a balance of \$168,794.86.<sup>80</sup> Although DCI is no longer providing telecommunications services, Ilatanet claims that Mr. Devine "will continue to remit payments on each debt" to the FCC.

**10. What is the status of Ilatanet's payment of public purpose program surcharges and user fees, if any, due to this Commission?**

CPED is not aware that Ilatanet has paid any public purpose program surcharges or user fees.

**11. Has the applicant put into place the personnel, processes and procedures necessary to maintain regulatory compliance?**

See Response to Issue #8.

**12. Does this Application pose any safety considerations, and, if so, how shall they be addressed?**

CPED is not aware of any safety considerations posed by Applicant's request for authority to provide calling card services.

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<sup>79</sup> PHC Transcript at 32:21 - 33:14.

<sup>80</sup> Ilatanet Response at 12.

#### IV. CONCLUSION

The Commission should not grant Ilatanet a CPCN until it has satisfactorily resolved all the issues identified in the May 9, 2016 Scoping Memo, and addressed in this brief. Specifically, Ilatanet and Mr. Devine must:

- Provide the necessary documentation of Ilatanet's financial resources in the form of audited financial statements;
- Provide the necessary \$25,000 bond as required by D. 13-05-035;
- Pay any owed public purpose program surcharges or user fees;
- Demonstrate that Mr. Devine has paid or is in the process of paying prior fines, judgments, penalties, etc. as detailed in this brief; and
- Demonstrate that they have the necessary business infrastructure in place to comply with regulatory rules and laws.

In addition, Ilatanet has been offering a regulated service without operating authority and should be subject to fines and penalties under Sections 2107 and 2108 of the PU Code. Ilatanet also committed a violation of Rule 1.1 by failing to disclose the prior regulatory violations of Mr. Devine and by mischaracterizing the service which it offers for purpose of avoiding regulatory responsibility. CPED recommends fines for these violations in an amount sufficient to be a deterrence.

Respectfully submitted,

/s/ TRAVIS T. FOSS

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